

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, CENTRAL STATES,
SOUTHEAST AND SOUTHWEST
AREAS HEALTH AND WELFARE
FUND, AND HOWARD McDOUGALL,
trustee,

Plaintiffs,

v.

AGL RESOURCES, INC., et al.,

Defendants.

No. 07 C 6933

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO DISMISS
COUNTERCLAIM AND MOTION FOR LEAVE INSTANTER TO AMEND ITS
COUNTERCLAIM**

Defendants, AGL Resources, Inc., et al., by its attorneys, Littler Mendelson, P.C., submits the following Response to Plaintiffs' Motion to Dismiss Counterclaim and files this Motion for Leave to File a First Amended Counterclaim instanter, and in support thereof states as follows:

1. On February 1, 2008, Plaintiffs filed a First Amended Complaint against Defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1990 seeking to collect contributions it believed to be owed based upon an audit of Defendants' records.

2. On February 17, 2008, Defendants filed their Answer to the First Amended Complaint along with a Counterclaim. In bringing their Counterclaim, Defendants essentially seek to recoup an overpayment of \$43,570.00 that Defendants tendered to Plaintiffs prior to the

filing of the instant lawsuit.

3. On March 3, 2008, Plaintiffs filed a Motion to Dismiss the Counterclaim. In their Motion to Dismiss Plaintiffs primarily argue that Defendants' Counterclaim is a state law claim of conversion and therefore is preempted by ERISA. (Plaintiffs' Memorandum in Support of Motion to Dismiss, p. 4). While Plaintiffs acknowledge that ERISA does not preempt a federal common law claim for restitution, they assert that Defendants' Counterclaim cannot be read to assert such a claim as currently plead. (Plaintiffs' Memorandum in Support of Motion to Dismiss, p. 5).

4. Although Defendants do not concede that their Counterclaim fails to properly plead viable claims, Defendants respectfully request that they be granted leave instanter to file a First Amended Counterclaim to clarify its cause of action. A copy of Defendants' proposed Amended Counterclaim is attached hereto as Exhibit 1.

WHEREFORE, Defendants, AGFL Resources, Inc. et al., request that this Court grant Defendant leave to file a First Amended Counterclaim Instanter.

Respectfully submitted,

s/ Alan A. Satyr

Alan Satyr

Attorney for Defendants

AGL Resources, Inc., NUI Capital
Corporation and Pivotal Utility Holdings,
Inc, f/k/a NUI Utilities, Inc.

Frederick L. Schwartz (#6204341)
Alan A. Satyr (#6238021)
LITTLER MENDELSON
A Professional Corporation
200 N. LaSalle Street
Suite 2900
Chicago, IL 60601
312.372.5520

Dated: March 27, 2008

CERTIFICATE OF SERVICE

I, Alan A. Satyr, an attorney, hereby certify that on March 27, 2008, a true and correct copy of the foregoing attached Defendants' Response to Plaintiffs' Motion to Dismiss Counterclaim and Motion for Leave Instantly to Amend Its Counterclaim was filed electronically, using the CM/ECF System which will automatically send e-mail notifications of such filing to the following attorney of record.

Rathna C. Rodgers
Central States Law Dept.
9377 West Higgins Road
Rosemont, Illinois 60018
rrodgers@centralstatesfunds.org

s/ Alan A. Satyr
Alan A. Satyr